No. 17-43

In the Supreme Court of the United States

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, requires the suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction.

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OPINIONS BELOW

The opinion of the court of appeals in *United States* v. *Los Dahda* (Pet. App. 1a-31a) is reported at 853 F.3d 1101. The opinion of the court of appeals in *United States* v. *Roosevelt Dahda* (Pet. App. 32a-58a) is reported at 852 F.3d 1282. The order of the district court denying petitioners' motion to suppress (Pet. App. 59a-65a) is unreported. The magistrate judge's report and recommendation that petitioners' motion be denied (Pet. App. 66a-76a) is also unreported.

JURISDICTION

The judgments of the court of appeals were entered on April 4, 2017. The petition for a writ of certiorari was filed on July 3, 2017, and granted on October 16, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2515 of Title 18 of the United States Code provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Section 2518(3) of Title 18 of the United States Code provides in relevant part:

> Upon * * * application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction) * * *.

Section 2518(10)(a) of Title 18 of the United States Code provides in relevant part:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer,

agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval. * * *

STATEMENT

This case presents a question concerning the suppression of evidence in criminal trials—not under the judge-made rules applicable to the Fourth Amendment, but rather under a statutory provision specifically governing facially insufficient wiretap orders. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress established a scheme under which courts may authorize the government to intercept wire, oral, and electronic communications in certain "circumscribed" circumstances. See *United States* v. *Giordano*, 416 U.S. 505, 512 (1974). To safeguard against unwarranted invasions of privacy, "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint." *Id.* at 515.

As is relevant here, Title III authorizes a judge to issue a wiretap order to intercept communications only within the court's territorial jurisdiction. And to ensure that wiretap orders comply with its detailed require-

ments, Title III requires the suppression of evidence derived from an order that is "insufficient on its face." 18 U.S.C. 2518(10)(a)(ii).

In this case, the district court issued wiretap orders authorizing the interception of communications outside the court's territorial jurisdiction, in contravention of Title III. Petitioners moved to suppress the evidence derived from the facially insufficient orders, but the district court denied the motion to suppress, and petitioners were convicted of various drug-related offenses.

The court of appeals affirmed. It agreed with petitioners that the orders were facially insufficient under Title III. But the court interpreted Section 2518(10)(a)(ii) to include an additional, atextual requirement: namely, that the facial insufficiency must result from a statutory violation that implicates a "core concern" of Title III in order to warrant suppression. After determining that Title III's territorial-jurisdiction limitation did not implicate such a core concern, the court of appeals upheld the district court's decision not to suppress the evidence derived from the facially insufficient orders at issue. The court of appeals' interpretation is irreconcilable with the plain text of Title III and the Court's decisions construing the statute, and its judgments in this case should therefore be reversed.

A. Background

1. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, Congress established a detailed scheme regulating the interception of wire communications. Title III permits courts to authorize the government to intercept oral, wire, and electronic communications in connection with the investigation of enumerated serious crimes. "[A]lthough Title III author-

izes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern." *Gelbard* v. *United States*, 408 U.S. 41, 48 (1972). Congress accordingly specified in detail who may apply for a wiretap order, what circumstances justify approval of a wiretap application, and what information must appear in the application and the order authorizing the interception. See 18 U.S.C. 2516, 2518; *Giordano*, 416 U.S. at 515. Congress prohibited all interceptions of oral and wire communications except those specifically permitted by the Act. See *Giordano*, 416 U.S. at 514.

To obtain a wiretap order, a law-enforcement official must file an application with a judge of competent jurisdiction. See 18 U.S.C. 2518(1). The application must state, among other things, the place where the communication is to be intercepted; the type of communications sought to be intercepted; the identity of the person, if known, whose communications are to be intercepted; and the identities of the law-enforcement official making the application and the official authorizing the application. See *ibid.* Moreover, because wiretapping was intended to be a method of last resort, the application must provide a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518(1)(c).

Under Title III, authority to intercept may be granted only for as long as is necessary to achieve the objectives of interception—and in no case for longer than 30 days. See 18 U.S.C. 2518(5). In addition, interception must be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Title III, and it must terminate upon attainment of the authorized objective. See *ibid.*

2. Congress also imposed significant limits on who may approve wiretap applications. Preexisting law allowed federal search warrants to be issued by mayors and United States commissioners (the forerunners of federal magistrate judges). See 18 U.S.C. 3041 (1964). That standard, however, was deemed "too permissive for the interception of wire or oral communications." S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968). Accordingly, in Title III, Congress restricted the authority to approve wiretap applications to federal district court and court of appeals judges (and state judges holding equivalent positions). See 18 U.S.C. 2510(9). Approval of wiretap applications is discretionary; a judge may enter a wiretap order as requested, or modify it. See 18 U.S.C. 2518(3). Those provisions were "intended to guarantee responsible judicial participation in the decision to use [wiretap] techniques." S. Rep. No. 1097, *supra*, at 91.

Before approving a wiretap application, the judge must determine that "there is probable cause for belief that an individual is committing, has committed, or is about to commit" an enumerated offense and that "there is probable cause for belief that particular communications concerning that offense will be obtained through [the] interception." 18 U.S.C. 2518(3)(a)-(b). The authority to approve wiretap applications is subject to numerous additional constraints. See 18 U.S.C. 2518(3)-(5).

Of particular relevance here, Title III permits a judge to enter an order authorizing wiretapping only "within the territorial jurisdiction of the court in which the judge is sitting." 18 U.S.C. 2518(3). Since the initial enactment of Title III in 1968, Congress has amended that provision only once. In the Electronic Communications Privacy Act of 1986, Congress added a parenthetical to the jurisdictional limitation, permitting judicial authorization of the

interception of communications outside the court's territorial jurisdiction "in the case of a mobile interception device authorized by a Federal court within such jurisdiction." *Ibid.*[1]

A wiretap order must particularize the extent and nature of the interceptions that it authorizes. Much like a wiretap application, a wiretap order must specify, among other things, the identity of the person, if known, whose communications are to be intercepted; the place where the authority to intercept is granted; the type of communications to be intercepted; and the period of time during which interception is authorized. See 18 U.S.C. 2518(4).

Once an order permitting interception of communications is issued, the issuing judge maintains continuing scrutiny over the investigation. A wiretap order can authorize interception only for as long as "is necessary to achieve the objective of the authorization," and, at most, for 30 days. 18 U.S.C. 2518(5). The issuing judge, however, may extend the authorization based on further application by law-enforcement officials at the end of the authorized period. See *ibid.* The judge may order the government to provide periodic reports regarding the progress of the investigation and the need for continued interception. See 18 U.S.C. 2518(6). The judge also maintains official control of the custody of any recordings or tapes produced by the authorized interceptions. See 18 U.S.C. 2518(8)(a). And upon termination of the order's

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[1] The phrase "mobile interception device" is not separately defined. According to a Senate Judiciary Committee report accompanying the 1986 amendment, Congress's objective in adding the parenthetical was to ensure that a wiretap order would remain effective in the event that a target vehicle was moved out of the issuing judge's jurisdiction after the order was issued, but before a surveillance device could be placed in the vehicle. See S. Rep. No. 541, 99th Cong., 2d Sess. 106 (1986).

authorization period, the judge is responsible for providing notice to the persons whose communications were intercepted. See 18 U.S.C. 2518(8)(d).

3. To enforce the various requirements of Title III, Congress adopted a mandatory suppression remedy for violations of those requirements. Title III provides that, "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial * * * if the disclosure of that information would be in violation of this chapter." 18 U.S.C. 2515.

"What disclosures are forbidden, and are subject to motions to suppress, is in turn governed by [Section] 2518(10)(a)[.]" *Giordano*, 416 U.S. at 524. Under that provision, an aggrieved person may move to suppress the contents of any communication intercepted pursuant to the statute on three grounds:

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

18 U.S.C. 2518(10)(a).

B. Facts And Procedural History

1. In 2011, the Drug Enforcement Agency and the Lawrence, Kansas, Police Department began a joint investigation into a suspected marijuana distribution ring. The initial investigation focused on a handful of individuals, not including petitioners. Through the use of investigative techniques, including numerous wiretap orders, the investigation expanded. In 2012, a grand jury in the

District of Kansas indicted petitioners, along with 41 other individuals, on various counts arising from an alleged conspiracy to distribute marijuana and other drugs. Pet. App. 3a-4a.

Before trial, petitioners moved to suppress evidence derived from nine wiretap orders issued by the United States District Court for the District of Kansas. Those orders authorized the government to intercept communications on certain mobile telephones used by petitioners and other individuals. Petitioners argued that the contents of the intercepted communications must be suppressed because the orders on their face exceeded the district court's territorial jurisdiction. Pet. App. 1a-2a, 14a, 33a, 39a-40a, 64a, 66a n.1.

Each of the wiretap orders at issue stated that, "in the event [the target telephones] are transported outside the territorial jurisdiction of the court, interception may take place in any other jurisdiction within the United States." J.A. 97, 105, 114, 123, 132, 140, 149, 158, 168, 174. The orders were insufficient on their faces because they affirmatively authorized interception outside the issuing court's jurisdiction in violation of Section 2518(3).

The government was aware that the targeted telephones were frequently transported outside Kansas; one of the wiretap orders targeted a phone used by a suspect known to reside in California. J.A. 136, 139. Pursuant to the terms of that order, the government maintained a listening post in Missouri to monitor calls from the California phone. In response to petitioners' motions to suppress, the government agreed not to use any communications intercepted at the Missouri listening post, thus implicitly recognizing that the order was facially insufficient under Section 2518(3).

2. The district court referred petitioners' motion to suppress to a magistrate judge, who recommended that

the court deny the motion. Pet. App. 66a-76a. Accepting the government's concession that it would not use any communications intercepted at the Missouri listening post, see *id.* at 68a n.7, the magistrate judge believed that the wiretap orders were not improper because, although they "*permitted* interception outside this court's jurisdiction, the government did not actually intercept cellular communications outside this court's jurisdiction." *Id.* at 72a-73a.

The district court overruled petitioners' objections and adopted the magistrate judge's report and recommendation. Pet. App. 59a-65a. In particular, the district court reaffirmed the magistrate judge's conclusion that the wiretap orders, "as applied," did not violate Title III. *Id.* at 64a.

At trial, evidence from the wiretap orders made up "[m]uch of the evidence" against petitioners. Pet. App. 14a, 39a. Petitioner Los Dahda was convicted on 15 counts of drug-related offenses and sentenced to 189 months of imprisonment. Petitioner Roosevelt Dahda was convicted on 10 counts and sentenced to 201 months of imprisonment.

3. On appeal, petitioners contended that the evidence derived from the wiretap orders should have been suppressed under 18 U.S.C. 2518(10)(a)(ii). As is relevant here, however, the court of appeals affirmed. Pet. App. 1a-31a, 32a-58a.[2] The court ruled in favor of the government on the suppression issue in petitioner Los Dahda's case, *id.* at 14a-25a, and then relied on that holding to reach the same conclusion in petitioner Roosevelt Dahda's case, *id.* at 40a.

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[2] Then-Judge Gorsuch participated in the oral argument but not the decisions in this case. See Pet. App. 1a n.*, 32a n.*.

a. At the outset, the court of appeals agreed with petitioners that the wiretap orders were facially insufficient because they exceeded the district court's territorial jurisdiction in violation of 18 U.S.C. 2518(3). Pet. App. 15a-20a. Relying on its own and other circuits' precedent, the court of appeals determined that interception occurs "both where the tapped telephones are located and where law enforcement officers put their listening post." *Id.* at 16a-17a. Because the orders at issue "authorized interception of cell phones located outside the issuing court's territorial jurisdiction, using listening posts that were also stationed outside the court's territorial jurisdiction," the orders violated Title III. *Id.* at 17a.

The court of appeals rejected the government's invocation of the statutory exception for the use of a "mobile interception device," reasoning that the exception covered only cases in which law-enforcement officials were specifically authorized to use a "mobile device for intercepting communications," such as a bug attached to a car phone. Pet. App. 20a. The phrase "mobile interception device," the court explained, plainly did not include stationary interception devices (or the mobile phones themselves), but instead referred to interception devices that were themselves mobile. *Id.* at 18a-20a. The court noted that, although the calls used at trial were intercepted within the issuing court's territorial jurisdiction, "the orders would have allowed interception of calls outside the issuing court's jurisdiction" and thus were facially insufficient. *Id.* at 24a & n.7.

Despite its determination that the wiretap orders were facially insufficient, the court of appeals proceeded to hold that Section 2518(10)(a)(ii) did not require suppression of evidence derived from those orders. Pet. App. 22a-25a. The court acknowledged that Section 2518(10)(a)(ii) provides for the suppression of evidence derived

from a facially insufficient wiretap order. *Id.* at 15a. It concluded, however, that only *some* facially insufficient wiretaps require suppression. *Id.* at 21a. In the court of appeals' view, suppression is required only for violation of "those statutory requirements that directly and substantially implement[] the congressional intention to limit the use of intercept procedures." *Ibid.* (internal quotation marks and citation omitted).

In applying that additional, atextual requirement, the court of appeals relied on its previous decision in *United States* v. *Radcliff*, 331 F.3d 1153 (10th Cir.), cert. denied, 540 U.S. 973 (2003). See Pet. App. 21a. In *Radcliff*, as in this case, the court of appeals considered whether Title III requires the suppression of evidence derived from a facially insufficient wiretap order. See 331 F.3d at 1162. To answer that question, the court of appeals looked to this Court's decisions in *United States* v. *Chavez*, 416 U.S. 562 (1974), and *United States* v. *Giordano*, 416 U.S. 505 (1974). See 331 F.3d at 1162. Those decisions considered a different provision, Section 2518(10)(a)(i), which requires the suppression of "unlawfully intercepted" communications. See *Chavez*, 416 U.S. at 574-575; *Giordano*, 416 U.S. at 525-526.[3]

In *Chavez* and *Giordano*, this Court reasoned that not every violation of Title III's requirements results in "unlawful[] intercept[ion]" under Section 2518(10)(a)(i); otherwise, the provision would render surplusage the other two provisions requiring suppression for certain violations (Section 2518(10)(a)(ii), for cases involving facially insufficient orders, and Section 2518(10)(a)(iii), for cases involving unauthorized interceptions). See *Chavez*, 416

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[3] *Chavez* and *Giordano* were decided on the same day, and *Chavez* incorporates by reference the statutory analysis in *Giordano*. See, *e.g.*, *Chavez*, 416 U.S. at 570.

U.S. at 574-575; *Giordano*, 416 U.S. at 525-526. The Court therefore concluded that suppression under Section 2518 (10)(a)(i) for "unlawful[] intercept[ion]" was required only for "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano*, 416 U.S. at 527. Lower courts have since described the standard for suppression set forth in *Chavez* and *Giordano* as establishing a requirement that the government's violation implicate the "core concerns" underlying Title III. See p. 30 n.7, *infra*.

Applying the "core concerns" test to Section 2518(10)(a)(ii) in this case, the court of appeals concluded that violation of the territorial-jurisdiction restriction in Section 2518(3), while rendering the orders facially insufficient, did not require suppression because "the territorial defect did not directly and substantially affect a congressional intention to limit wiretapping." Pet. App. 14a. According to the court, the core concerns animating Title III were "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *Id.* at 21a (quoting S. Rep. No. 1097, *supra*, at 66).

The court of appeals determined that the orders at issue did not implicate Congress's privacy concern because Section 2518(3)'s territorial-jurisdiction limitation "was not mentioned in the legislative history" of Title III. Pet. App. 22a. The court further determined that the orders did not implicate Congress's uniformity concern either because the territorial-jurisdiction limitation "potentially

undermine[s] uniformity by requiring prosecutors in multiple jurisdictions to coordinate about how they use electronic surveillance." *Id.* at 23a.

The court of appeals acknowledged that its conclusion that the territorial-jurisdiction limitation did not implicate a "core concern" of Title III conflicted with the decision of the District of Columbia Circuit in *United States* v. *Glover*, 736 F.3d 509 (2013). Pet. App. 21a. Confronted with a similar facial insufficiency in that case, the D.C. Circuit reached two dispositive holdings, both of which diverged from the Tenth Circuit's holdings in this case. First, the D.C. Circuit held that the "core concerns" test did not apply to motions to suppress evidence from facially insufficient orders under Section 2518(10)(a)(ii); rather, suppression under that provision was a "mechanical test." *Glover*, 736 F.3d at 513. Second, it held in the alternative that, even if the "core concerns" test did apply, the territorial-jurisdiction limitation implicated a core concern of Title III. See *id.* at 515.

b. Judge Lucero concurred. Pet. App. 30a-31a. He joined the majority opinion but wrote separately to note that Title III is "in need of congressional attention" to address "[a]dvances in wiretapping technology." *Ibid.*

SUMMARY OF ARGUMENT

At bottom, this case presents a simple question: Did Congress mean what it said when it required suppression of evidence derived from a facially insufficient wiretap order? Under familiar rules of statutory interpretation, the answer to that question is yes. The court of appeals' decision to jettison the statute's plain text and impose a judge-made limitation on Title III's mandatory suppression remedy was an act of statutory invention, not statutory interpretation. Its judgments should be reversed.

I. The relevant provisions of Title III are unambiguous and straightforward. Section 2515 directs courts to suppress evidence obtained from a wiretap order authorized under the statute if "the disclosure of that information would be in violation of this chapter." Section 2518(10)(a)(ii), in turn, specifically and unambiguously states that the suppression of wiretap evidence is required if "the order of authorization or approval under which it was intercepted is insufficient on its face." Title III establishes no other requirement for suppression in the case of a facially insufficient order.

Title III therefore compels suppression of the evidence derived from the wiretap orders at issue here. Those orders were facially insufficient because they authorized collection of evidence anywhere within the United States, in disregard of Title III's clear limitation that a judge may authorize interception of communications only "within the territorial jurisdiction of the court in which the judge is sitting." 18 U.S.C. 2518(3).

The court of appeals' decision to cabin the circumstances in which evidence derived from a facially insufficient wiretap order must be suppressed cannot be justified under traditional principles of statutory interpretation. Congress specifically chose to provide for suppression regardless of whether a wiretap order's facial insufficiency implicates a "core concern" of Title III. That choice cannot be negated under the guise of statutory interpretation.

United States v. *Chavez*, 416 U.S. 562 (1974), and *United States* v. *Giordano*, 416 U.S. 505 (1974), do not support the court of appeals' imposition of an additional, atextual "core concerns" requirement. In those decisions, the Court adopted the "core concerns" test as a construction of the phrase "unlawfully intercepted" in subpara-

graph (i) of Section 2518(10)(a), and it did so for the specific purpose of distinguishing subparagraph (i) from subparagraphs (ii) and (iii). That test is not, and was not intended to be, a substantive limitation on Title III's suppression remedy as a whole. Reading a "core concerns" requirement into subparagraph (ii) would turn the Court's construction upside down by rendering subparagraph (ii) superfluous. Only by enforcing subparagraph (ii) as written can courts give independent meaning to each of the enumerated grounds for suppression in Section 2518 (10)(a).

II. Even assuming that the "core concerns" test were a prerequisite under Section 2518(10)(a)(ii) as well as Section 2518(10)(a)(i), the suppression of evidence derived from an extraterritorial wiretap order would still be required. In drafting Title III, Congress sought to guard against the overuse of electronic surveillance by requiring judges to review and authorize every wiretap application and to maintain ongoing supervision of the use of wiretaps.

The strict enforcement of Title III's territorial-jurisdiction restriction would limit the ability of law-enforcement officials to engage in forum shopping as a means of evading the searching judicial review of wiretap applications that Congress envisioned. The territorial-jurisdiction limitation thus directly implicates Title III's "core concern" of protecting privacy, as well as the fundamental principle of our legal system that courts may act only within their own jurisdictions. Even under the "core concerns" test, the court of appeals' judgments in this case cannot stand. Those judgments should be reversed.

ARGUMENT

I. TITLE III REQUIRES THE SUPPRESSION OF EVIDENCE OBTAINED PURSUANT TO A FACIALLY INSUFFICIENT WIRETAP ORDER

A. The Plain Text Of Section 2518(10)(a)(ii) Unambiguously Requires Suppression

As in all statutory-interpretation cases, this Court's analysis "begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks and citation omitted). "And where the statutory language provides a clear answer, it ends there as well." *Ibid.* Here, the statutory scheme unambiguously makes suppression the remedy when evidence is derived from a wiretap order that is "insufficient on its face." 18 U.S.C. 2518(10)(a)(ii).

1. Congress enacted Title III to "prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in [the statute]." *United States* v. *Giordano*, 416 U.S. 505, 514 (1974) (footnote omitted). In furtherance of that goal, Congress provided in Section 2515 that, "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence * * * if the disclosure of that information would be in violation of this chapter." 18 U.S.C. 2515. Section 2515 thus "imposes an evidentiary sanction to compel compliance" with Title III's requirements. S. Rep. No. 1097, *supra*, at 96.

"What disclosures are forbidden, and are subject to motions to suppress, is in turn governed by [Section] 2518(10)(a), which provides for suppression of evidence on [three] grounds." *Giordano*, 416 U.S. at 524; cf. S. Rep. No. 1097, *supra*, at 106 (stating that Section 2518(10)(a)

"provides the remedy for the right created by section 2515"). Section 2518(10)(a) provides that an "aggrieved person * * * may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom," on three grounds:

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

18 U.S.C. 2518(10)(a).[4] If a motion to suppress is granted on one of those three enumerated grounds, the contents of the intercepted communication "shall be treated as having been obtained in violation of this chapter" in accordance with Section 2515. *Ibid.*

Section 2518(10)(a) thus supplies the specific grounds for invoking Section 2515's evidentiary sanction. And once one of the specific grounds in Section 2518(10)(a) has been satisfied, the statute imposes no additional prerequisites for suppression.

2. a. Under Section 2518(10)(a), a defendant may move to suppress evidence derived from wiretap orders because (i) the interception was "unlawful," (ii) the order authorizing interception was "insufficient on its face,"

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[4] Title III separately defines an "aggrieved person" as a "person who was a party to" an intercepted communication or a "person against whom the interception was directed." 18 U.S.C. 2510(11). That definition "defines the class of those who are entitled to invoke the suppression sanction of section 2515" through "the motion to suppress provided for by section 2518(10)(a)." S. Rep. No. 1097, *supra*, at 91. It is undisputed here that petitioners are "aggrieved persons" for purposes of the statute.

"*or*" (iii) the interception was "not made in conformity with" the order. 18 U.S.C. 2518(10)(a) (emphasis added). Congress's use of the disjunctive "or" confirms that only one of the three grounds for suppression need be satisfied for suppression to occur. See, *e.g.*, *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014). And as a corollary, Congress's use of the word "or" indicates that each of the three grounds should be "given separate meanings." *Ibid.* (citation omitted).

Pursuant to subparagraph (i), evidence is subject to suppression if the communication at issue was "unlawfully intercepted." 18 U.S.C. 2518(10)(a)(i). Pursuant to subparagraph (ii), by contrast, evidence is subject to suppression if "the *order* * * * under which [the communication] was intercepted is insufficient on its face." 18 U.S.C. 2518(10)(a)(ii) (emphasis added). By its terms, subparagraph (ii) does not concern itself with how the communication was *actually* intercepted; instead, a court need only examine the four corners of the order itself to determine the facial sufficiency of the order under the statutory scheme. And the statute necessarily contemplates that an order may be "insufficient on its face," necessitating suppression under subparagraph (ii), even though the communication was not "unlawfully intercepted" under subparagraph (i).[5]

b. In *United States* v. *Chavez*, 416 U.S. 562 (1974), and *Giordano*, *supra*, this Court considered what it

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[5] Similarly, subparagraph (iii) asks whether the communication was intercepted "in conformity with" the order. 18 U.S.C. 2518(10)(a)(iii). A wiretap order may be sufficient on its face and thus not violate subparagraph (ii). If the interception was not authorized by the order, however, suppression would still be required under subparagraph (iii).

means for a communication to have been "unlawfully intercepted" under Section 2518(10)(a)(i). In both cases, the specific question was whether the violation of the statutory requirement regarding who could authorize a wiretap application rendered the resulting interceptions "unlawful" for purposes of subparagraph (i).[6] The wiretap orders at issue were facially sufficient, and the communications had been intercepted in conformity with the authorization orders; as a result, there was no basis for suppression under Section 2518(10)(a)(ii) or (iii).

Notably for present purposes, in determining whether the resulting interceptions were "unlawful" for purposes of subparagraph (i), the Court discussed the interplay between the three subparagraphs. The Court explained that the "unlawful[] intercept[ions]" described in subparagraph (i) "must include some constitutional violations"; for example, suppression for lack of probable cause is "not provided for in so many words" by subparagraphs (ii) and (iii), and an interception without probable cause thus must fall within subparagraph (i). *Giordano*, 416 U.S. at 525-526. At the same time, the Court continued, subparagraphs (ii) and (iii) "plainly reach some purely statutory defaults without constitutional overtones, and these omissions cannot be deemed unlawful interceptions under [sub]paragraph (i)." *Id.* at 526. Were it otherwise, subparagraphs (ii) and (iii) would be surplusage. See *ibid.*

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[6] In *Giordano*, the wiretap application erroneously stated that it had been authorized by one of the Department of Justice officials specified in 18 U.S.C. 2516(1); in fact, it had been authorized by an official who lacked the statutory authority to do so. See 416 U.S. at 525. In *Chavez*, the wiretap application erroneously stated that it had been authorized by one of the Department of Justice officials specified in 18 U.S.C. 2516(1); in fact, it had been authorized by another (but still appropriate) official. See 416 U.S. at 574.

The Court ultimately concluded that subparagraphs (ii) and (iii) "must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under [sub]paragraph (i)." *Giordano*, 416 U.S. at 527; see *Chavez*, 416 U.S. at 575. But the Court rejected the government's argument that subparagraph (i) should be limited only to constitutional violations. See *Giordano*, 416 U.S. at 527. To render subparagraph (i) applicable to some statutory violations without rendering subparagraphs (ii) and (iii) surplusage, the Court determined that the phrase "unlawfully intercepted" reached cases in which "there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Ibid.*

For present purposes, the key point is that the Court adopted the foregoing interpretation of subparagraph (i) precisely in order to give meaning to each of the subparagraphs of Section 2518(10)(a) and to avoid rendering any of them surplusage. See *Giordano*, 416 U.S. at 525-526. The Court plainly was not construing or limiting what it means for an order to be facially insufficient under subparagraph (ii). See *ibid.*

3. Under the plain language of Section 2518(10)(a)(ii), suppression is the mandatory remedy when evidence is derived from a wiretap order that is facially insufficient. The court of appeals correctly determined that the wiretap orders here were facially insufficient. Accordingly, the evidence derived from those orders should have been suppressed without any additional inquiry.

a. To begin with, as the court of appeals determined (Pet. App. 20a), each of the wiretap orders here was plainly "insufficient on its face." 18 U.S.C. 2518(10)(a)(ii).

Because Title III does not define the phrase "insufficient on its face," the Court should "look first to the [phrase's] ordinary meaning." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011). The phrase "insufficient on its face" implies a comparison of the four corners (*i.e.* the "face") of the order itself and the requirements of Title III; if the failure to comply with those requirements is evident from the text of the order, then the order is naturally "insufficient on its face." See, *e.g.*, *Giordano*, 416 U.S. at 525 n.14 (comparing "the order, on its face," with the requirements of Section 2516(1) in order to determine whether the order was "insufficient on its face" under subparagraph (ii)); *Chavez*, 416 U.S. at 573-574 (same).

Here, the wiretap orders were facially insufficient because they exceeded the judge's authorizing powers: that is, they purported on their face to authorize interceptions that the judge did not have the power to authorize. Title III permits a judge to enter an order authorizing the interception of communications only "within the territorial jurisdiction of the court in which the judge is sitting." 18 U.S.C. 2518(3). The orders at issue here did not require law-enforcement officials to maintain their listening post in Kansas (nor did they require the target phones to be located in Kansas). Quite to the contrary, the orders specifically and affirmatively authorized interception to "take place in any other jurisdiction within the United States" if the target phones were transported out of the territorial jurisdiction of the court. J.A. 97, 105, 114, 123, 132, 140, 149, 158, 168, 174.

By permitting interception to take place anywhere in the United States, the orders impermissibly authorized the government to maintain their listening post outside Kansas—as the government in fact did, in the case of at

least one of the orders at issue. See p. 9, *supra*. The orders thus facially violated Title III's territorial-jurisdiction limitation. See Pet. App. 20a.

The statutory exception to the territorial limitation for use of "a mobile interception device" does not cure the facial insufficiency of the orders at issue. 18 U.S.C. 2518(3). As the government recognizes, that exception is applicable only "in narrow circumstances." Br. in Opp. 17. As the court of appeals explained, "the term 'mobile interception device' means a mobile device for intercepting communications," such as a mobile bug. Pet. App. 20a; see also *id.* at 17a n.4 (describing "small mobile devices" that "are capable of intercepting the content from cellphone calls"). The legislative history confirms that understanding of the term. See p. 7 n.1, *supra*. Because the orders here did not authorize use of a mobile interception device, that narrow exception does not apply and the orders were facially insufficient. See Pet. App. 20a.

b. Because the wiretap orders at issue here were facially insufficient, the evidence derived from those orders should have been suppressed. When faced with questions of statutory interpretation, this Court has stated "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). In this case, the statutory text could not be any clearer: Section 2518(10)(a)(ii) requires the suppression of evidence derived from a wiretap order that is "insufficient on its face," without any further inquiry into whether the insufficiency resulted from the violation of a provision that implicates a "core concern" of Title III. As Judge Silberman explained in his opinion for the D.C. Circuit, subparagraph (ii) creates a "mechanical test" under which "[s]uppression is the mandatory remedy." *United States* v. *Glover*, 736 F.3d 509,

513 (2013). And where, as here, the statutory text is unambiguous, the sole function of the courts is to enforce its terms, unless the resulting interpretation would be absurd. See, *e.g.*, *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004).

Far from being absurd, requiring suppression for evidence derived from a facially insufficient wiretap order is entirely consistent with Congress's intent to "prohibit * * * all interceptions of oral and wire communications, except those specifically provided for in the Act." *Giordano*, 416 U.S. at 514. Although Congress recognized the importance of wiretapping in combating crime, Congress expressed concern that electronic surveillance posed a grave threat to the privacy of Americans. See, *e.g.*, S. Rep. No. 1097, *supra*, at 66-67.

To protect against that threat, Congress delineated in exacting detail the requirements for, and limitations on, wiretap applications and orders. The Senate report explained that "[t]he application must conform to section 2518" and that "[t]he judicial officer's decision is also circumscribed by section 2518." S. Rep. No. 1097, *supra*, at 97. The Senate report further stressed that Title III's suppression remedy was "necessary and proper to protect privacy" and "should serve to guarantee that the standards of [Title III] will sharply curtail the unlawful interception of wire and oral communications." *Id.* at 96. Requiring the suppression of evidence derived from authorization orders that violate the various requirements of Title III, then, is not at odds with the statute; it is exactly what Congress intended. Accordingly, this Court should enforce Section 2518(10)(a)(ii) according to its terms. See *Lamie*, 540 U.S. at 534.

c. The court of appeals' failure to suppress the evidence from the wiretap orders at issue here requires reversal of the judgments below. As the court of appeals

acknowledged, "[m]uch of the evidence" against petitioners was obtained through the facially insufficient wiretap orders. Pet. App. 14a, 39a. Any error here cannot be deemed harmless in light of the government's heavy reliance on that invalidly obtained evidence at trial and in its briefing before the court of appeals. See 15-3236 Gov't C.A. Br. 3-6.

B. The Court Of Appeals' Contrary Interpretation Of Section 2518(10)(a)(ii) Is Deeply Flawed

The court of appeals correctly determined that the wiretap orders at issue in this case were facially insufficient. But the court of appeals erred when it held that a court may suppress evidence derived from a facially insufficient wiretap order under Section 2518(10)(a)(ii) only if the statutory violation "directly and substantially affect[ed] a congressional intention to limit wiretapping." Pet. App. 14a. That interpretation of Section 2518(10)(a)(ii) is incorrect and should be rejected. Engrafting an atextual "core concerns" requirement onto Title III's mandatory suppression remedy is inconsistent with the plain text of the statute and would undermine, not implement, this Court's decisions in *Chavez* and *Giordano*.

1. As explained above, the text of Section 2518(10)(a)(ii) provides that suppression is required where a wiretap order is "insufficient on its face." That remedy is mandatory without regard to whether the communication was also "unlawfully intercepted" for purposes of subparagraph (i) or whether the facial insufficiency implicates a "core concern" of Title III.

Under the court of appeals' interpretation, however, defendants must satisfy an additional, judge-made "core concerns" requirement before they can invoke the suppression remedy. Such a judicially fashioned limitation may be permissible when considering the exclusionary

rule under the Fourth Amendment. Cf., *e.g.*, *United States* v. *Leon*, 468 U.S. 897 (1984). But Congress did not leave the decision whether to suppress wiretap evidence collected in violation of Title III's requirements to the discretion of the federal courts. Instead, Congress created a comprehensive statutory scheme for wiretap surveillance with its own "circumscribed" procedures and protections. *Giordano*, 416 U.S. at 512. Under that scheme, "[t]here is no room for judicial discretion." *Glover*, 736 F.3d at 513. Rather, a court is obligated to "determine if Congress has provided that suppression is required for [a] particular procedural error." *Chavez*, 416 U.S. at 570.

With respect to facially insufficient wiretap orders, Congress specifically chose to require suppression even where the insufficiency does not result in the unlawful interception of communications under subparagraph (i). The court of appeals had no power to override that congressional choice. Because "the statutory remedy is automatic" under Section 2518(10)(a)(ii), *Glover*, 736 F.3d at 516, the court of appeals' failure to suppress the fruits of the facially invalid orders was erroneous.

2. In the decisions under review, the court of appeals provided little justification for its atextual reading of the statute, relying primarily on its earlier opinion in *United States* v. *Radcliff*, 331 F.3d 1153 (10th Cir. 2003). There, the court of appeals acknowledged that this Court had articulated the "core concerns" requirement "with respect to motions to suppress under [Section 2518(10)(a)(i)]." 331 F.3d at 1162. But the court of appeals nevertheless concluded, without explanation, that "th[e] requirement is equally applicable to motions to suppress under [Section] 2518(10)(a)(ii)." *Ibid.*

That reasoning, such as it was, was mistaken. This Court's decisions in *Chavez* and *Giordano* do not extend the "core concerns" test into subparagraph (ii), and the

rationales of those decisions provide no support for doing so. Indeed, extending the "core concerns" test to subparagraph (ii) would produce the very redundancy this Court sought to avoid in *Chavez* and *Giordano* when it first adopted that test as a way of narrowing the phrase "unlawfully intercepted" in subparagraph (i).

a. As a preliminary matter, this Court expressly held that the wiretap orders at issue in *Chavez* and *Giordano were* facially sufficient; they stated that the underlying applications had been authorized by an Assistant Attorney General, when in fact they had been authorized by other individuals. See pp. 20 n.6, 22, *supra*. There was thus no basis for suppression under Section 2518 (10)(a)(ii); the question in those cases was whether violation of the statutory requirement regarding who could authorize a wiretap application rendered the resulting interceptions of communications "unlawful" for purposes of subparagraph (i). See *Chavez*, 416 U.S. at 574; *Giordano*, 416 U.S. at 525.

In answering that question, the Court recognized the potential for overlap between, and gaps within, the three subparagraphs of Section 2518(10)(a). The Court explained that the "unlawful[] intercept[ions]" described in subparagraph (i) "must include some constitutional violations"; for example, suppression for lack of probable cause is "not provided for in so many words" by subparagraphs (ii) and (iii), and an interception without probable cause thus must fall within subparagraph (i). *Giordano*, 416 U.S. at 525-526. The Court then noted that subparagraphs (ii) and (iii) "plainly reach some purely statutory defaults without constitutional overtones, and these omissions cannot be deemed unlawful interceptions under [sub]paragraph (i)." *Id.* at 526. Were it otherwise, subparagraphs (ii) and (iii) would be surplusage. See *ibid.* The restriction on subparagraph (i) adopted in *Chavez*

and *Giordano*—the "core concerns" test—was intended to address the latter problem and to avoid leaving any of the subparagraphs of Section 2518(10)(a) "drained of all meaning." *Giordano*, 416 U.S. at 525-526; see *Chavez*, 416 U.S. at 575.

If suppression for facial insufficiency under subparagraph (ii) were limited to situations in which the relevant statutory violation implicated the "core concerns" of Title III, however, it would recreate the very problem that this Court fixed in *Chavez* and *Giordano*. Under such a construction, any violation that gives rise to suppression under subparagraph (ii) would also do so under subparagraph (i). As a result, applying the "core concerns" test to subparagraph (ii) "would actually treat that [sub]paragraph as 'surplusage'—precisely what [the] Court tried to avoid in *Giordano*." *Glover*, 736 F.3d at 514.

b. Notably, neither the Tenth Circuit (in the decisions below) nor the government (in opposing certiorari) identified a single circumstance in which, under their interpretation, a facially insufficient order would require suppression under subparagraph (ii) but the interception would not also require suppression under subparagraph (i). The court of appeals did not address the redundancy problem at all. And for its part, the government merely hypothesized that "a court *might* conclude that suppression is warranted under subparagraph (ii) even if the interception complied with the terms of the order and was not 'unlawful[]' under subparagraph (i)" in one circumstance: namely, where "the identity of the person whose communications are to be intercepted" was "known" under 18 U.S.C. 2518(4) but not included in the wiretap order. Br. in Opp. 15 (emphasis added). But the government offered no authority to support its *ipse dixit* assertion that suppression would be warranted in that circumstance under paragraph (ii)—nor could it, given that the government's

hypothetical closely resembles the facts of an actual case: *United States* v. *Donovan*, 429 U.S. 413 (1977).

In *Donovan*, the relevant wiretap applications identified some persons whose communications were to be intercepted, but failed to identify additional known persons. See 429 U.S. at 419-420. The Court stated that there was "no basis" to suggest the wiretap orders were facially insufficient under subparagraph (ii). *Id.* at 432. That made eminent sense, because it would have been impossible to detect from the four corners of the orders that the underlying applications failed to identify the additional persons at issue. The Court proceeded to hold that the failure to identify those persons in the applications did not require suppression under subparagraph (i) either, because it did not implicate the "core concerns" of Title III. See *id.* at 433-435. *Donovan* thus demonstrates that, in the government's hypothetical, the defect would not implicate subparagraph (ii) at all.

3. The decision under review is far from the only one to graft an additional "core concerns" requirement onto the mandatory suppression remedy in Section 2518(10)(a)(ii). But insofar as other courts of appeals have reached the same conclusion, it should in no way affect this Court's analysis; those courts have merely relied on the same overbroad reading of *Chavez* and *Giordano* discussed above. See *United States* v. *Acon*, 513 F.2d 513, 516-517 (3d Cir. 1975); *United States* v. *Robertson*, 504 F.2d 289, 292 (5th Cir. 1974), cert. denied, 421 U.S. 913 (1975); *United States* v. *Vigi*, 515 F.2d 290, 293 (6th Cir.), cert. denied, 423 U.S. 912 (1975); *United States* v. *Lawson*, 545

F.2d 557, 562 (7th Cir. 1975); *United States* v. *Swann*, 526 F.2d 147, 148-149 (9th Cir. 1975) (per curiam).[7]

Remarkably, some courts have adopted that interpretation of subparagraph (ii) while recognizing that, under the logic of *Giordano*, the "core concerns" test *should not* be applied to subparagraph (ii). For example, the Third Circuit acknowledged that *Giordano* "impl[ies] that [sub]-paragraphs (ii) and (iii) must reach violations of some provisions of Title III which do not directly and substantially implement the congressional intent to limit use of wiretaps." *Acon*, 513 F.2d at 517. But it nevertheless went on to insist that, "[d]espite this intention to extend [subparagraph (ii)] further than [subparagraph (i)]," there was a "distinction between information which the government may vary by subsequent affidavit and information which must stand on the four corners of the affidavit," with the result that suppression is not required for "facial insufficiency relating to less critical requirements." *Id.* at 518.

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[7] The phrase "core concerns" appears to have originated in the Eleventh Circuit's decision in *Adams* v. *Lankford*, 788 F.2d 1493 (1986). There, the court considered whether a violation of Section 2518(3)'s territorial-jurisdiction limitation was an error of sufficient magnitude to be cognizable on a petition for habeas corpus. See 788 F.2d at 1495. Relying on this Court's habeas jurisprudence, the Eleventh Circuit determined that the relevant inquiry was "whether the asserted Title III violations are merely formal or technical errors, or whether the alleged violations implicate the core concerns of Title III." *Id.* at 1497 (citing *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979)). The Eleventh Circuit later extended that "core concerns" analysis to direct review. See *United States* v. *Nelson*, 837 F.2d 1519, 1527 (11th Cir.), cert. denied, 488 U.S. 829 (1988). Other courts have since applied that label to the additional requirement set out in *Chavez* and *Giordano*. See, *e.g.*, Pet. App. 21a; *Glover*, 736 F.3d at 513; *United States* v. *North*, 735 F.3d 212, 218 (5th Cir. 2013) (DeMoss, J., concurring).

With all due respect, that is not an appropriate method of statutory interpretation. When Congress crafts an unambiguous statutory provision, a court is not free to pick and choose the parts of that provision it will enforce, even if it views certain aspects of the provision to be "less critical." And when this Court gives that statutory provision an interpretation—whether express or "impl[ied]"—lower courts must give effect to that interpretation. *Acon*, 513 F.2d at 517. Congress's clear "intention to extend [subparagraph (ii)] further than [subparagraph (i)]," *ibid.*, as affirmed by this Court in *Chavez* and *Giordano*, should end the analysis. This Court should put a stop to the lower courts' chronic, erroneous interpretation of the suppression remedy in subparagraph (ii).

4. To be sure, with the passage of time, the way in which law enforcement uses Title III has changed dramatically. While the drafters of the original statute primarily envisioned the surveillance of stationary targets, the vast majority of wiretap orders authorized in recent years target mobile phones (whether phone calls, text messages, or other applications). See United States Courts, *Wiretap Report 2016* (Dec. 31, 2016) <tinyurl.com/wiretap2016>; Kyle G. Grimm, *The Expanded Use of Wiretap Evidence in White-Collar Prosecutions*, 33 Pace L. Rev. 1146, 1159 n.83 (2013) (Grimm).

Technological improvements have also simplified the process of wiretapping. The Federal Bureau of Investigation (FBI) uses a sophisticated surveillance system to intercept communications through a central network, which connects the FBI's "wiretapping rooms" (*i.e.*, listening posts) in field offices and other locations across the country to switches operated by major landline, mobile, and Internet companies. See Christopher Doval et al., *The Communications Assistance for Law Enforcement*

Act: An Assessment of Policy Through Cost and Application, 32 Temp. J. Sci. Tech. & Envtl. L. 155, 168 (2013).

To the extent that "[a]dvances in wiretapping technology" may require modification of Title III's substantive provisions or its mandatory suppression remedy, however, that is fundamentally a matter that requires "congressional attention," not the intervention of this or any other court. Pet. App. 30a-31a (Lucero, J., concurring). That is particularly so because what was true in 1968 remains true today: Congress is best "situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." *United States* v. *Jones*, 565 U.S. 400, 429-430 (2012) (Alito, J., concurring in the judgment).

In particular, the tremendous advances in technology over the last five decades—including the sophisticated wiretapping methods used in this case—only exacerbate the privacy concerns that motivated the Congress that enacted Title III. As this Court has recognized, "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by" their pre-digital analogues. *Riley* v. *California*, 134 S. Ct. 2473, 2488-2489 (2014). Mobile phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 2484. The array of information contained on, or transmitted to and from, a typical mobile phone means that wiretaps can produce not just a record of what was said during a particular call, but "a digital record of nearly every aspect of [individuals'] lives." *Id.* at 2490.

Congress alone has the ability to weigh the competing societal interests that are affected by modern surveillance and to determine how those interests should be balanced. Indeed, Congress's history of attention to developments in technology and surveillance confirms that it is able and

willing to address the concerns of law enforcement when appropriate. For example, in amending Title III in 1986, Congress brought the statute "in line with technological developments," S. Rep. No. 541, *supra*, at 3, through the addition of the parenthetical permitting judicial authorization of a wiretap order outside of the court's territorial jurisdiction "in the case of a mobile interception device authorized by a Federal court within such jurisdiction." 18 U.S.C. 2518(3).

If the government wishes to expand the available territorial jurisdiction of wiretap orders still further, it should take the matter up through the front door by seeking a further amendment from Congress, rather than through the back door by seeking an atextual limitation on the statutory suppression remedy from this Court. Because there is no valid basis in the existing statute for the limitation the court of appeals imposed, its interpretation should be rejected.

II. EVEN IF TITLE III IMPOSED A 'CORE CONCERNS' TEST, SUPPRESSION WOULD STILL BE REQUIRED WHERE AN ORDER EXCEEDS THE JUDGE'S TERRITORIAL JURISDICTION

For the reasons given above, there is no valid basis for departing from the statute's plain text and extending the judge-made "core concerns" test to Section 2518(10)(a)(ii). The court of appeals should have enforced the statute as written and held that the wiretap evidence in petitioners' case should have been suppressed.

Even if a "core concerns" test were an additional prerequisite for suppression under Section 2518(10)(a)(ii), however, the court of appeals erred in concluding that the territorial-jurisdiction limitation does not implicate a "core concern" of Title III. That limitation advances Congress's desire to safeguard against the unwarranted use

of wiretapping by providing a functional restraint on forum shopping by prosecutors seeking wiretap authorization. Accordingly, a breach of the territorial-jurisdiction limitation is not merely a technical violation of Title III, but rather a substantive violation that directly implicates "the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano*, 416 U.S. at 527.

A. The permissibility of electronic surveillance was the subject of intense national debate in the years leading up to Title III's enactment. See, *e.g.*, *Berger* v. *New York*, 388 U.S. 41, 60 (1967); Presidential Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* 203 (1967) (Presidential Commission Report). Influential figures, including President Johnson, argued that electronic surveillance should be outlawed entirely, except in cases presenting grave national-security concerns. See, *e.g.*, S. Rep. No. 1097, *supra*, at 172-173.

Others took the view that the invasions of individual privacy inherent in electronic surveillance could be justified in exceptional circumstances. See, *e.g.*, Presidential Commission Report 201-203. But "even [the] most zealous advocates" of electronic surveillance recognized the need to restrict its use in order to minimize "encroachments on a man's right to privacy, * * * the most comprehensive of rights and the right most valued by civilized men." S. Rep. No. 1097, *supra*, at 170 (internal quotation marks and citation omitted). Accordingly, a presidential commission recommended that Congress enact legislation "carefully circumscrib[ing] authority" for wiretapping with the goal of "significantly reduc[ing] the incentive for, and the incidence of, improper electronic surveillance." Presidential Commission Report 203.

Mindful of the widespread concern for privacy when drafting Title III, Congress "evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." *Giordano*, 416 U.S. at 515. Consistent with that intent, Congress required judges to play an active role in determining whether wiretap applications should be granted. See S. Rep. No. 1097, *supra*, at 91; National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, *Electronic Surveillance* 12 (1976) (National Commission Report). A judge must evaluate, *inter alia*, whether the applicant has provided sufficient information to meet the requirements of probable cause and particularity, see 18 U.S.C. 2518(1), (4); has established the necessity of wiretapping over more traditional investigative techniques, see 18 U.S.C. 2518(1); and has demonstrated that adequate measures will be taken to minimize the government's intrusion, see 18 U.S.C. 2518(5).

Moreover, unlike with a traditional search warrant, which *must* issue upon a showing of probable cause, see Fed. R. Crim. P. 41(d), Title III vests a judge with the discretion to modify the terms of requested surveillance or to reject a wiretap application entirely, regardless of whether the statute's requirements have otherwise been satisfied. See 18 U.S.C. 2518(3); S. Rep. No. 1097, *supra*, at 102. And judicial control and supervision over the surveillance process continues even after wiretap orders have been issued. See pp. 7-8, *supra*.

By mandating comprehensive judicial oversight of wiretapping, Congress ensured that "the right of privacy of our citizens will be carefully safeguarded by a scrupulous system of impartial court authorized supervision."

S. Rep. No. 1097, *supra*, at 225. But that "scrupulous system" could easily be undermined if prosecutors were free to pick a favorable judge (or pool of judges) to whom their wiretap application would be submitted. Such forum shopping would present a "substantial" danger by "circumvent[ing]" the requirement of "detached, neutral[] judicial review." National Commission Report 73; see *United States* v. *North*, 735 F.3d 212, 219 (5th Cir. 2013) (DeMoss, J., concurring).

Strict enforcement of the territorial-jurisdiction limitation restricts the ability of prosecutors to engage in forum shopping. Like the authorization requirement considered in *Chavez* and *Giordano*, the territorial-jurisdiction limitation protects privacy by "inevitably foreclos[ing] resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court." *Giordano*, 416 U.S. at 528. Because the territorial-jurisdiction limitation "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device," *id.* at 527, suppression of evidence obtained from a wiretap order authorizing extraterritorial surveillance serves the "core concerns" of Title III.

B. In reaching the contrary conclusion, the court of appeals primarily relied on the supposed dearth of legislative history discussing the territorial-jurisdiction limitation. See Pet. App. 21a-22a. In particular, the court of appeals emphasized that, while the Senate report accompanying the passage of Title III identified two examples of the statute's privacy protections, the territorial-jurisdiction limitation was not one of those examples. See *id.* at 22a. The court of appeals' inference from that legislative history was mistaken.

1. To begin with, the territorial-jurisdiction limitation is expressly set out in Title III, see 18 U.S.C. 2518(3), and that express inclusion is itself an indication of the requirement's importance to Congress. Even the most ardent purposivist would hesitate before ignoring a requirement in the plain text of a statute simply because the legislative history does not expound on the centrality of the requirement to the broader statutory scheme.

The court of appeals' conclusion is especially puzzling because the limitation in question involves jurisdiction and thereby implicates a "core concern" of our entire legal system. It is axiomatic that a court may act only within its own jurisdiction. See, e.g., *Moore* v. *Mitchell*, 281 U.S. 18, 23 (1930); *Booth* v. *Clark*, 58 U.S. (17 How.) 322, 338 (1854); *Toland* v. *Sprague*, 37 U.S. (12 Pet.) 300, 329 (1838).

Consistent with that principle, a federal district court possesses extraterritorial jurisdiction to issue a search warrant only in certain exceptional circumstances. See Jennifer Daskal, *The Un-Territoriality of Data*, 125 Yale L.J. 326, 354-360 (2015). The presumption against extraterritoriality in this context is so well established that, where a statute authorizing the issuance of search warrants failed to contain a territorial limitation, one was implied. See *Weinberg* v. *United States*, 126 F.2d 1004, 1006 (2d Cir. 1942); cf. Fed. R. Crim. P. 41(b) (limiting the authority of a magistrate judge to issue a warrant outside the district in which the judge sits).

Viewed in light of the longstanding background presumption against extraterritoriality, the absence of any discussion of Title III's territorial-jurisdiction limitation in the legislative history is unremarkable. Congress could readily have thought that it was unnecessary to provide a rationale for the limitation. Congress's failure to state the

obvious when adopting the territorial-jurisdiction limitation does not diminish its importance.

More broadly, in focusing on the absence of a specific explanation for the territorial-jurisdiction limitation in the legislative history, the court of appeals overlooked the numerous references in the legislative record to the essential role that judges were intended to play *within* their respective jurisdictions. As discussed above, judicial review of wiretap applications and continued oversight of wiretap orders were considered essential to guard against the unwarranted or excessive use of electronic surveillance. See pp. 6-8. The prohibition against extraterritorial wiretap authorizations promotes that statutory purpose by limiting efforts to evade close scrutiny and oversight of questionable wiretap applications. In so doing, the territorial-jurisdiction limitation advances Congress's "core concern" of protecting individual privacy.

2. The court of appeals was equally misguided in focusing myopically on the two examples of privacy protections mentioned in Title III's legislative history. See Pet. App. 22a. In fact, Title III contains numerous provisions intended to protect privacy beyond the ones cited in the legislative history, including the requirement that law enforcement's objectives cannot be accomplished by traditional means of surveillance (the so-called "necessity" requirement), see 18 U.S.C. 2518(1)(c), and the requirement that wiretapping be carried out in a fashion that "minimize[s] the interception of communications not otherwise subject to interception" (the so-called "minimization" requirement), 18 U.S.C. 2518(5). Given the existence of those provisions, the fact that *some* of Title III's privacy protections are highlighted in the legislative history cannot plausibly signify that Title III's many other protections do not implicate a "core concern."

3. Finally, the court of appeals reasoned that the territorial-jurisdiction limitation does not implicate a "core concern" of Title III because it does not prevent forum shopping altogether: in the court's view, the government could still manipulate the system by using a "mobile interception device." Pet. App. 23a. Here again, however, the court misconstrued the statute: Title III requires that the property on which the mobile interception device is to be placed be located within the issuing court's district when interception is authorized. See *Glover*, 736 F.3d at 514.

Accordingly, Title III's reference to mobile interception devices does not provide a back-door means of engaging in nationwide surveillance. Nor was it intended to do so: Congress's limited objective in adding that reference in the 1986 amendments to Title III was to ensure the continued effectiveness of a wiretap order where "a listening device installed in a vehicle" (or on a phone fixed in the vehicle) was authorized to be placed on the vehicle within the issuing judge's jurisdiction, but the vehicle later moved outside that jurisdiction. S. Rep. No. 541, *supra*, at 30. As the government correctly acknowledges, the reference to mobile interception devices permits extraterritorial interception only in "narrow circumstances." Br. in Opp. 17.

The court of appeals further suggested that the government could circumvent the territorial-jurisdiction limitation simply by using a listening post in the issuing judge's jurisdiction. See Pet. App. 24a. Taking this case as an example, the court speculated that, "if law enforcement had wanted to obtain a wiretap order from a judge in Nebraska, law enforcement could use a listening post in Nebraska even though none of the underlying events or suspected co-conspirators bore any connection to Nebraska." *Ibid.* Even if that is theoretically true, that form of forum shopping is practically unlikely: any listening

post would need to be staffed by agents familiar with the investigation, potentially requiring the relocation of law-enforcement officials for the duration of the surveillance. In fact, the government conceded in the district-court proceedings that moving a listening post to another jurisdiction would be "logistical[ly] impractical." J.A. 67.

In any event, whether the territorial-jurisdiction limitations prevents forum shopping entirely, there can be no serious dispute that it limits it. In that respect, the territorial-jurisdiction limitation promotes Congress's desire, as expressed by Title III's chief sponsor, that the statute be "very definitely as free from loopholes as it can possibly be made." *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 869 (1967) (statement of Sen. McClellan).

In light of the plain text of Section 2518(10)(a)(ii), of course, this Court need not consider whether the territorial-jurisdiction limitation implicates a "core concern" of Title III. Should it reach that issue, however, the Court should conclude that it does. In either event, the Court should hold that, where a wiretap order is facially insufficient because the order exceeds the judge's territorial jurisdiction, suppression of the evidence derived from the order is required. The court of appeals' contrary conclusion cannot be sustained, and its judgments in this case should therefore be reversed.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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